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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE PADILLA, Defendant and Appellant.	G050811 (Super. Ct. No. 12NF3905) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ronnie Padilla was convicted of committing multiple sex crimes against his daughter V. and his niece-in-law A. At trial, the prosecution presented evidence appellant had unlawful sexual intercourse with V.'s mother Gina when she was a teenager. While appellant admits this evidence was properly admitted, he contends the trial court erred in instructing the jurors they could use it to conclude he had a propensity to commit sex crimes and was thus guilty of the charged offenses. We uphold the court's instructions and affirm the judgment.

FACTS

Gina was born in 1978, eight years after appellant. They met in church when Gina was five years old and began dating in 1992 when she was fourteen. Their relationship became sexual and culminated in the birth of V. in 1993. After V. was born, appellant visited her from time to time, but there was no formal visitation arrangement until 1998, when appellant was granted visitation every other weekend.

The visits occurred at appellant's home in Fullerton. At the time, appellant was married to a woman named Lenore, whose niece A. was about a year older than V. A. stayed at appellant's house on most of the same weekends as V., and the two became friends. On one of the very first visits, when V. was six years old, appellant touched her vagina while they were sitting together on a couch. He also put his mouth on her vagina over her underwear. Following this incident, appellant molested V. every time she came to visit over the next several years. The molestation primarily involved appellant touching V.'s vagina with his hand or mouth. But one time he had V. orally copulate him, and another time he slightly inserted his penis into her vagina for a brief period of time.

On at least two occasions, A. witnessed appellant touching V. in an inappropriate fashion. V.'s friend Alyssa also saw appellant take advantage of V. One night while Alyssa was having a sleep over with V., appellant came into their room, removed his clothes and started rubbing his penis on and "humping" V.'s body. At the time, he also reached over to Alyssa and rubbed her arm.

A. endured similar mistreatment. Starting when she was about six or seven years old, appellant routinely touched and rubbed her vagina. One time, he also rubbed his penis between A.'s legs on her vagina, but she managed to position her body in such a way so as to avoid penetration, and appellant stopped altogether when he noticed Lenore getting out of the shower. On another occasion, Lenore saw appellant on top of one of the girls, touching her breasts. However, when Lenore asked the girls about it later that night, they denied anything had happened.

In fact, for many years V. and A. kept their victimization a secret. But one day, V. saw A. and appellant moving around under the covers on the couch in a suspicious manner. That night, V. asked A. what was happening on the couch, and she admitted appellant had been molesting her. V. then told A. that she too had been molested by appellant. Their conversation empowered V. to tell her cousin Sabrina and Sabrina's mother Rose (appellant's sister) that appellant had been molesting her.

Appellant soon caught wind of the allegation. In December 2005, when V. was 12 years old, he told Gina that Rose was spreading rumors that he had been molesting V. Gina asked appellant if the rumors were true, and he said no. Gina then called V. into the room and asked appellant the same question. When appellant again said no, V. told him to stop lying and tell the truth. At that point, appellant put his head down, started crying and asked V. and Gina for forgiveness. Gina told appellant to leave and called the police.

After appellant left, Gina asked V. to tell her what had happened between her and appellant. V. said appellant had touched her "private" area and made him suck

his penis. Gina promptly reported this to A.'s mother An., who in turn asked A. if appellant had ever touched her inappropriately. When A. said yes, An, took her over to Gina and V.'s house to discuss the situation. Then they all went to the police station to make a report.

The initial investigation into the allegations did not result in criminal charges. Although the first detectives to work on the case prepared it for presentation to the district attorney, they did not actually submit it. The case lingered for several years until Detective Laura Markoski took it over in 2010. She presented the case to the district attorney for filing at that time but it was rejected as being stale. Markoski started the investigation all over again.

By that time, V. had forgiven appellant and renewed her relationship with him. When she graduated from high school, appellant attended the ceremony, and when appellant got remarried, V. was a member of his wedding party. Gina also gravitated back to appellant. Even though appellant admitted to her that he had acted inappropriately toward V. in the past, Gina looked to him for financial assistance. Appellant not only helped Gina on that front, he also let V. and her stay with him and his new wife for about three weeks when they needed a place to stay. While appellant's generosity diminished V.'s desire to see him prosecuted, Detective Markoski continued to pursue her investigation.

In September 2012, Markoski contacted appellant at his home, and he agreed to talk. At the start of the interview, appellant was very self-assured and denied any wrongdoing or making any earlier admissions. But as the interview wore on, he conceded he had written V. and taken ownership of some of the mistakes he had made during his life. He also said he would be willing to write letters to A. and Alyssa. However, by the time the interview was over, appellant seemed dejected; he reneged on the letter promise. At one point in the interview, he indicated that, for legal reasons, there were some things he could not put in writing.

Appellant was arrested three months later, in December 2012. After that, Markoski reinterviewed V. and Gina, and the case proceeded to trial. V., Gina, A., An., Alyssa and Lenore all testified against appellant. Appellant did not take the stand, but his sister Rose and niece Sabrina testified that neither V. nor A. ever told them that appellant had molested them. The jury convicted appellant of lewd conduct with and continuous sexual abuse of V. and committing three lewd acts against A. It also found a multiple-victim allegation to be true. The court sentenced appellant to 30 years to life.

DISCUSSION

Appellant's sole contention on appeal is that the trial court erred in allowing the jury to consider his unlawful sexual activity with Gina in deciding the charges against him. We disagree.

Evidence of a defendant's prior bad acts is generally inadmissible to prove his conduct on a specific occasion or his propensity for criminal activity. (Evid. Code, § 1101, subd. (a).)[1] Such evidence may only be admitted to prove some other material fact in the case, such as motive or intent. (§ 1101, subd. (b).) An exception to the propensity rule exists in cases involving alleged sex crimes. In such cases, "evidence of the defendant's commission of another sexual offense . . . is not made inadmissible by [s]ection 1101, if the evidence is not inadmissible pursuant to [s]ection 352." (§ 1108, subd. (a).)[2] So long as the uncharged sex offense is not barred by section 352, it may be

[1] Unless noted otherwise, all further statutory references are to the Evidence Code.

[2] Section 352 gives trial courts discretion to exclude evidence if its probative value is substantially outweighed by its prejudicial impact.

used as propensity evidence in sex crime cases to prove the defendant is disposed to commit such crimes and thus guilty of the charged offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911-912, 920, 923.)

In this case, the prosecution filed a pretrial motion to admit evidence that when appellant was 22 and Gina was 14, they commenced an unlawful sexual relationship that resulted in the birth of V. in 1993.[3] The prosecution argued the evidence was admissible under section 1108 to show appellant had a propensity to commit sex crimes and to help the jury determine whether he was guilty of the charged offenses. In so arguing, the prosecution also discussed why it believed the evidence was not unduly prejudicial within the meaning of section 352.

At the motion hearing, defense counsel argued appellant's sexual relationship with Gina was consensual in the sense there was no force or intimidation involved, and therefore it was not relevant to the charged offenses, which were predatory in nature. However, the court noted Gina's tender age made it legally impossible for her to consent to having intercourse with appellant, like the victims in this case, and that the crimes against them did not involve force, either. The court pointed out Penal Code section 261.5 makes it unlawful for a man to have sexual intercourse with a minor who is not his wife. The court also noted section 1108 expressly references Penal Code section 261.5 as one of the sexual offenses that is admissible to prove a defendant's propensity to commit sex crimes. (§ 1108, subd. (d)(1)(A).) Thus, the court determined the evidence of appellant's unlawful sexual relationship with Gina was admissible under section 1108.

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[3] The prosecution's moving papers alleged Gina was 13 years old at the time appellant had unlawful sexual intercourse with her, but at trial Gina testified she did not start having intercourse with appellant until she was 14 years old.

In instructing the jury about this evidence, the court stated, "If you decide that the defendant committed the uncharged offense [of unlawful sexual intercourse with a minor, i.e., Gina], you may, but are not required to, conclude from this evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, conclude that the defendant was likely to commit and did commit [the charged offenses]. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of [the charged offenses]. The People must still prove each charge and allegation beyond a reasonable doubt."

Appellant does not dispute the evidence of his sexual relationship with Gina was admissible. Indeed, he admits it was a relevant aspect of the case that would have come into evidence irrespective of section 1108. However, he claims the court erred by instructing the jury it could use his sexual relationship with Gina as anything more than background information about the parties. Appellant puts forth three arguments in support of this claim, but as we now explain, none of them have merit.

Appellant first contends the trial court erred from a procedural standpoint by failing to consider section 352 in ruling on the subject evidence. Appellant is correct that the trial court did not expressly mention section 352 in rendering its ruling. However, the court did refer to and analyze section 1108, which, as noted above, makes clear that evidence of prior sex crimes is admissible for propensity purposes only if the evidence passes muster under section 352. And in its pretrial motion, the prosecution thoroughly analyzed the section 352 factors in arguing for admission of the subject evidence. Under these circumstances, it is reasonable to infer the trial court understood its responsibilities under section 352. (*People v. Williams* (1997) 16 Cal.4th 153, 213 [in evaluating evidence under section 352 "a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so"]; *People v. Padilla* (1995)

11 Cal.4th 891, 924 [trial court's awareness of duties under section 352 may be inferred from arguments of counsel].) So the court's failure to allocute its section 352 analysis is unavailing.

Next, appellant contends that had the trial court properly applied section 352, it would have determined it was unduly prejudicial to use the subject evidence to prove his propensity to commit sex crimes. But, as appellant readily admits, the prejudicial impact of the evidence of his unlawful sexual relationship with Gina was diminished by the fact the evidence was undisputed and its presentation took up very little time at trial. And, the evidence paled in comparison to the charged offenses, which lessened the likelihood the jury was unduly swayed by it. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 205; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

Nonetheless, appellant contends there was not sufficient similarity between his prior sexual misconduct with Gina and the charged offenses to meet the threshold requirement of relevancy in this case. In his view, "the fact [he] committed a crime when he had consensual sex with Gina [] when she was 14 years old and he was 22 had no tendency in reason or logic to prove that he had a propensity or disposition to commit sex crimes against pre-pubescent children. It is one thing for a 22-year-old male to have an inappropriate dating/sexual relationship with a 14-year-old female, but quite another to commit sexual offenses with one's own six-year-old daughter. The commission of one does not support the inference of a propensity to commit the other."

Contrary to appellant's belief, similarity between the prior and charged sex offenses is not a requirement under section 1108. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.) In fact, courts have recognized that imposing a similarity requirement would undermine the purpose of the statute and ignore the fact many sex offenders are not specialists in terms of the crimes they commit. (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.)

As a practical matter, it is true that the less similar the prior sex crimes are to the charged offenses, the less relevance the former will likely have in terms of proving the latter. (See, e.g., *People v. Earle* (2009) 172 Cal.App.4th 372, 398 [questioning whether the defendant's act of indecent exposure was relevant to prove he had a propensity to commit rape].) Lack of similarity between the prior and charged offenses will also make it more difficult for the prior crimes to survive scrutiny under section 352. (See, e.g., *People v. Harris* (1998) 60 Cal.App.4th 727, 741 [inflammatory evidence regarding the defendant's prior sexual offense should have been excluded under section 352].) However, there are no hard and fast rules respecting the admission of prior sex crimes. Each case must be decided on its own facts, and on appeal we must keep in mind that the determination of whether such evidence should be admitted "'is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.'" (*Id*. at p. 730, quoting *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

Here, we do not believe the trial court abused its discretion in admitting evidence appellant had unlawful sexual intercourse with Gina in order to prove his propensity to commit sex crimes, including the charged offenses. There were, after all, some similarities between the subject offenses. As respondent points out, "Apellant did not use any physical force or violence to commit either the charged or uncharged offenses" and "appellant had relationships with both the charged and uncharged victims, they were not strangers." Granted, there was an age difference between appellant's victims. Gina was 14 years old when appellant engaged in unlawful sexual intercourse with her, and V. and A. were only about 6 or 7 years old when appellant started molesting them. However, appellant continued to molest V. and A. up until the time they were 12 and 13 years old, respectively. Appellant's desire to take advantage of Gina when she was 14 years old was probative of whether he molested V. and A. when they were only slightly younger.

This is so even though appellant was in a "dating" relationship with Gina when he had sexual intercourse with her. Despite appellant's attempt to characterize his sexual relations with Gina as consensual, minors cannot legally consent to having sex with adults. This rule stems from the realization minors need special protection from adults who might be tempted to exploit their lack of social, emotional, and cognitive development. Appellant, in victimizing Gina, demonstrated he was such an adult. Based on his actions toward Gina, the jury could reasonably conclude he had a predatory nature and was thus inclined to target and victimize other females, including children under the age of puberty. Therefore, we do not believe the trial court abused its discretion in telling the jury it could draw this conclusion in reaching its verdict.

Lastly, appellant submits that even if the jury was properly permitted to find his misconduct with Gina evinced a proclivity for sex crimes, it was unfair to permit the jury to use that finding to conclude he committed the charged offenses. Had that been the full extent of the court's instructions on this issue, appellant would have a stronger argument. But the instructions also informed the jury that appellant's misconduct with Gina was only a single factor in the case which, by itself, was insufficient to prove appellant's guilt and that the prosecution still had to prove all of the charges beyond a reasonable doubt. And in his closing argument, the prosecutor reiterated these points to the jury, as well. Under these circumstances, the court's instructions on the use of the appellant's prior sexual misconduct were not unfair or erroneous. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1013; *People v. Falsetta, supra*, 21 Cal.4th at p. 920.) They are thus not grounds for reversal.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.